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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1880.

No. ~~140.~~ 8

HARRIET SKIDMORE, LEMUEL SKIDMORE, AND WILLIAM B. SKIDMORE, PLAINTIFFS IN ERROR,

vs.

THE PITTSBURG, CINCINNATI AND SAINT LOUIS RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 16, 1880.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 140.

HARRIET SKIDMORE, LEMUEL SKIDMORE, AND WILLIAM B. SKIDMORE, PLAINTIFFS IN ERROR,

vs.

THE PITTSBURG, CINCINNATI AND SAINT LOUIS RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Thursday, the eighth day of July, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fifth.

WM. H. BRADLEY, *Clerk.*

HARRIET SKIDMORE, LEMUEL SKIDMORE, AND William B. Skidmore
v.
PITTSBURG, CINCINNATI AND ST. LOUIS RAILway Company. } Ejectment.

NORTHERN DISTRICT OF ILLINOIS, *set:*

Be it remembered that on the eighth day of January, A. D. 1877, came the said plaintiffs, by George Willard, esq., their attorney, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, their bond for costs, præcipe for a writ of summons, and declaration against said defendants in said entitled cause, which said bond for costs, præcipe, and declaration are respectively in the words and figures following, to wit:

Bond for costs.

2 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court thereof, March term, A. D. 1877.

HARRIET SKIDMORE ET AL.
vs.
THE PITTSBURG, CINCINNATI & ST. LOUIS Railway Company. } Bond for costs.

I do hereby enter myself security for cost in this cause and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance to the laws of the United States.

Dated this 8th day of January, A. D. 1877.

GEO. WILLARD.

(Endorsed:) Filed Jan'y 8, 1877. Wm. H. Bradley, cl'k.

3 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court thereof, March term, A. D. 1877.

HARRIET SKIDMORE, LEMUEL SKIDMORE, AND William B. Skidmore
vs.
THE PITTSBURG, CINCINNATI & ST. LOUIS RAILway Company. } Ejectment. Damages, $1,000.00

The clerk of said court will issue a summons in the above-entitled cause

to said defendant, in a plea in ejectment to the damage of said plaintiffs in the sum of one thousand dollars, direct the same to the marshal of said district to execute, and make it returnable to the term of said court, A. D. .

Chicago, Jan'y 8, 1877.

GEO. WILLARD,
Plaintiffs' Attorney.

To WM. H. BRADLEY, Esq.,
Clerk of said Court.

(Endorsed:) Filed Jan'y 8, 1877. Wm. H. Bradley, c'lk.

4 *Declaration.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court thereof, March term, A. D. 1877.

HARRIET SKIDMORE, LEMUEL SKIDMORE, AND William B. Skidmore
vs.
PITTSBURG, CINCINNATI AND ST. LOUIS RAILWAY COMPANY.

Harriet Skidmore, Lemuel Skidmore, and William B. Skidmore, citizens of the State of New York, and resident in the city of New York, in said State, plaintiffs in this suit, by George Willard, their attorney, come and complain of the Pittsburg, Cincinnati and St. Louis Railway Company, a corporation organized under and existing by virtue of the laws of the States of Ohio, Indiana, and doing business and having agents in the district aforesaid, which has been summoned according to the form of the statute in such case made and provided, in a plea of ejectment:

For that whereas the said plaintiffs, on the sixth day of May,
5 A. D. 1876, were possessed of certain lots or parcels of real estate, with the appurtenances, situate in the county of Cook, in the said northern district of Illinois, and State of Illinois, and known and described as follows, to wit: Lots one (1), two (2), three, four, five, six, seven, eight, nine, ten, eleven, fourteen, fifteen, and sixteen, in block six, in Carpenter's addition to Chicago; also lots seven, eight, nine, ten, eleven, and sublots twelve, thirteen, fourteen, fifteen, and sixteen, in block four, of Magie and High's addition to Chicago, which said premises the said plaintiffs claim in fee-simple; and the said plaintiffs being so possessed thereof, the said defendant afterwards, to wit, on the sixth day of May, A. D. 1876, entered into the said premises and ejected the said plaintiffs therefrom, and unlawfully withhold from the said plaintiffs the possession thereof, to the damage of said plaintiffs of one thousand dollars, and therefore they bring suit, etc.

GEO. WILLIARD,
Attorney for Plaintiffs.

(Endorsed:) Filed Jan'y 8, 1877. Wm. H. Bradley, cl'k.

6 And on the same day, to wit, the 8th day of January, A. D. 1877, a writ of summons issued out of said marshal's office in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of summons.

7 Circuit court of the United States of America, northern district of Illinois, ss.

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon the Pittsburg, Cincinnati & St. Louis Railway Company, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March next, to answer unto Harriet Skidmore, Lemuel Skidmore, & William B. Skidmore of a plea of ejectment to their damage, as they allege, of one thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this eighth day of January, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the 101' year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

8 I served the within writ by personally reading & delivering a true copy thereof to E. Walker, the attorney for the Pittsburg, Cincinnati & St. Louis Railway Company, on the 10th day of January, A. D. 1877. I was not able to find the president of said company.

B. H. CAMPBELL, *U. S. Marshal,*
By A. C. CAMPBELL, *Deputy.*

Marshal's fees: 1 service, 2.00; 1 copy, 50—$2.50.

(Endorsed:) Filed Jan'y 10th, A. D. 1877. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 8th day of May, A. D. 1877, said defendant, by its attorney, filed in said clerk's office its plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

9 In the circuit court of the United States for the northern district of Illinois.

HARRIET SKIDMORE ET AL.
vs.
PITTSBURG, CINCINNATI & ST. LOUIS RAILWAY COMPANY. } Ejectment. Plea.

And the defendant, by E. Walker, its attorney, comes and defends the wrong and injury, when, &c., and says that it is not guilty of unlawfully

withholding the tenements in the said declaration mentioned, or any part thereof, in manner and form as the plaintiffs have above thereof complained against it.

And of this the defendant puts itself upon the country, &c.

E. WALKER,
Att'y for P. C. and St. L. R'y Co.

And the plaintiffs do the like.

GEO. WILLIARD,
Att'y for Pl'ffs.

(Endorsed:) Filed May 8, 1877. Wm. H. Bradley, clerk.

10 Afterwards, to wit, on the 12th day of June, A. D. 1879, in the adjourned May term of said court, in the record of the proceedings of said court in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

HARRIET SKIDMORE ET AL. *v.* THE PITTSBURG, CINCINNATI AND ST. LOUIS Railway Company.	Ejectment.

Now come the parties by their attorneys, and upon issue joined by agreement they waive the intervention of a jury, and for trial put themselves upon the court, and after hearing the evidence the court takes the same under advisement, with leave to the attorneys to furnish briefs.

Afterwards, to wit, on the 28th day of June, A. D. 1879, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

HARRIET SKIDMORE, LEMUEL SKIDMORE, AND William B. Skidmore *v.* THE PITTSBURG, CINCINNATI AND ST. LOUIS Railway Company.	Ejectment.

The court having considered and being now fully advised upon the matters heretofore submitted herein, finds the defendant not guilty; and on motion of the defendant's attorney for judgment herein, it is there-
11 upon considered and adjudged by the court that the defendant be discharged, and that it have and recover of the plaintiffs the costs and charges in this behalf expended, and that it have execution therefor.

Afterwards, to wit, on the 8th day of December, A. D. 1879, in the adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

HARRIET SKIDMORE
v.
THE PITTSBURGH, CINCINNATI AND ST. LOUIS Railway Company.

The costs having been paid, on motion of Mr. Willard, it is ordered by the court that the judgment entered herein on June 28th, 1879, be, and the same is hereby, set aside and vacated, and this cause to be redocketed.

Afterwards, to wit, on the 13th day of April, A. D. 1880, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

HARRIET SKIDMORE
v.
THE PITTSBURGH, CINCINNATI AND ST. LOUIS Railroad Company. } Ejectment.

12 Now come the parties, by their attorneys, and upon issue joined herein, by agreement of the parties as per stipulation filed, they waive the intervention of a jury and for trial put themselves upon the court, and after hearing the evidence and the arguments of counsel the court, not being sufficiently advised in the premises, takes time to consider.

Afterwards, to wit, on the 16th day of April, A. D. 1880, the following stipulation was filed in said entitled cause, to wit:

Stipulation.

13 In U. S. cir. c't, northern dist. of Ill.

HARRIET SKIDMORE ET AL.
v.
PITTSBURG, CINCINNATI & ST. LOUIS Railway Co. } Stipulation. Ejectment.

It is stipulated and agreed that the value of the premises in controversy in this suit is more than five thousand dollars.

E. WALKER,
Att'y for Def't.
GEO. WILLIARD,
Att'y for Pl'ffs.

(Endorsed:) Filed Apr. 16, 1880. W. H. Bradley, cl'k.

Afterwards, to wit, on the 8th day of July, A. D. 1880, in the July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

HARRIET SKIDMORE, LEMUEL SKIDMORE, AND William B. Skidmore
v.
14 PITTSBURG, CINCINNATI AND ST. LOUIS Railway Company.
} Ejectment.

Now again come the parties by their attorneys, and the court having considered and being now fully advised in the premises, finds the defendant not guilty. It is thereupon considered and adjudged by the court that the defendant recover of the plaintiffs its costs and charges in this behalf expended, taxed at the sum of twelve dollars and fifty-five cents, and that the defendant have execution therefor.

And on the same day, to wit, the 8th day of July, A. D. 1880, in the hearing of said cause, the following exceptions were taken and allowed by the court and made of record in said entitled cause, to wit:

Bill of exceptions.

15 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court thereof, July term, A. D. 1880.

HARRIET SKIDMORE ET AL.
v.
PITTSBURGH, CINCINNATI & ST. LOUIS RAILroad Company.
} Bill of exceptions.

Be it remembered that on the trial of said cause at the term, A. D. 18 , before the court, without the intervention of a jury, a jury having been duly waived by the parties to said cause, the said plaintiffs, to maintain the issues on their part, introduced evidence tending to prove the facts to be as thereafter specially found by the court, and from which evidence so introduced by the plaintiff, the court thereafter did find specially the following facts, to wit:

1. That on the second day of February, 1872, the Columbus, Chicago and Indiana Central Railway Company, a corporation for rail-
16 way purposes, of the State of Illinois, received a conveyance in fee of the following-described premises, to wit: Lots one (1) to eleven (11), both inclusive, and lots fourteen (14), fifteen (15), and sixteen (16), all in block six (6) of Carpenter's addition to Chicago, Cook County, Illinois; and on the thirty-first day of May, 1872, said company received a conveyance in fee of the following-described premises, to wit, lots seven (7), eight (8), nine (9), ten (10), and eleven (11), in block four (4) of Magee and High's additions to Chicago, Cook County, Illinois.

2. That on the 19th day of April, 1873, William B. Skidmore recovered a judgment against the said Columbus, Chicago & Indiana Central Railway Company for the sum of $6,830.94 in the circuit court of Cook County, Illinois; that execution was issued upon said judgment, and on the 10th day of June, 1873, the same was levied upon all the right, title, and interest of the said C., C. & I. C. R'y Co. in and to the said premises hereinbefore

described; and that pursuant to said levy and due advertisement by the sheriff of said county, said premises were offered for sale at public vendue to the highest bidder for cash by said sheriff on the 3d day of July, 1873, and said William B. Skidmore being the highest and best bidder therefor said premises were struck off and sold to him by said sheriff and a certificate of such sale was issued and duly recorded July 19th, 1873.

17 3. That said premises were not redeemed from said sale, and on the 3rd day of May, 1876, the sheriff executed, acknowledged, and delivered a deed of conveyance of said premises to the plaintiffs, who are the only heirs at law of said William B. Skidmore, deceased, late of the city of New York, in the State of New York, of which State the plaintiffs are citizens; that said William B. Skidmore died subsequent to his purchase of said premises and before the execution of said deed; that said deed was duly recorded on the eleventh day of May, 1876.

4. That the premises in controversy are worth more than the sum of five thousand dollars; and the said defendant, to maintain the issues on its part, introduced evidence tending to prove the existence of facts as thereafter specially found by the court, and from which evidence so introduced by the defendant the court thereafter did find specially the following facts, to wit:

1. That the defendant is a corporation organized and existing under the laws of the State of Ohio for railway purposes; that on the first day of February, 1869, it became the lessee of the railway and property of C., C. & I. C. Ry. Co. for the term of 99 years, and immediately thereafter entered into possession of said railroad & all its lands & property, including the property in controversy; that said lease was recorded in Cook

18 County, Illinois, July 21st, 1873; that said lease does not purport to convey after-acquired property, but that the premises in question are now occupied and used by it for railway purposes the same as though it were included within the terms of said lease.

That in the spring of the year 1868 the said Columbus, Chicago & Indiana Central Railroad Company, a corporation for railroad purposes, existing and doing business in the State of Illinois under the laws of said State, and owning and operating a railroad from the city of Chicago, in the State of Illinois, to the city of Columbus, in the State of Ohio, purchased the lands in controversy situate in the city of Chicago, upon time contracts by which the purchase-money was to be fully paid within four years from the date of said purchase, and on the payment of said purchase-money a deed in fee-simple of said lands was to be made to said company; that immediately after making said contract of purchase, and in pursuance of the terms thereof, said company entered into possession of said premises, and erected thereon its engine-houses and certain shops, structures, and side tracks necessary for the operation of its railroad, and has continued to use the same by itself and its lessees in connection with the use and operation of its railroad, and still uses the same for that purpose; that the deeds in fee-simple which were made to said company of said lands were made in pursuance of the terms of said contracts of

19 purchase; that said company was paid all taxes and assessments on said lands, and has had the sole use and enjoyment of said lands by itself and its lessees since said contracts of purchase, and in all respects acted as owner thereof.

That on the 20th day of February, 1868, said C., C. & I. C. R'y Co. executed, acknowledged, and delivered to James A. Roosevelt and William R. Fosdick a trust mortgage to secure bonds to the amount of $15,000,000, which said mortgage was duly recorded in Cook County, Illinois, March 7th, 1868.

That said mortgage was executed by authority of the board of directors of said company, of which the following is a copy:

Whereas at a meeting of the board of directors of the said Columbus, Chicago and Indiana Central Railway Company, the party of the first part held, pursuant to law, on the 13th day of February, in the year 1868, it was determined that it was expedient to reduce to single forms and classes all of the bonded debts aforesaid, of both and all of the said corporations, of which the said company so consolidated, the party of the first part, was constituted, and for which said party of the first part was, by liens upon its property or otherwise, liable; and thereupon, for that purpose, the said board of directors resolved and enacted an order and resolution as follows, to wit:

"And it is further ordered by the board that whereas by the ar-
20 ticles of consolidation between the Chicago and Great Eastern Railway Company and the Columbus and Indiana Central Railway Company, under and by virtue of which this corporation was formed, it was agreed and covenanted that, to provide for the redemption and payment of all the first-mortgage bonds outstanding and owing by both of said companies, and for which these respective railroads and properties, or any parts of the same, were mortgaged or pledged, and which this company, by reason of said consolidation or otherwise, is bound to pay, consolidated mortgage bonds to an amount not exceeding fifteen millions of dollars should be made and issued by this company, and secured by a mortgage of all the property, rights, and franchises of this (consolidated) company; that eleven millions five hundred thousand dollars of the said issue of bonds should be used for the redemption and payment of the said eleven millions five hundred thousand dollars of the said first-mortgage bonds of the said several companies first above mentioned now outstanding on such terms and at such times as might be ordered by the board of directors of this company, but that none of said issue of consolidated bonds should be exchanged or paid for any of said bonds so to be redeemed by them at less than dollar for dollar.

"Therefore it is resolved that an issue of bonds to the amount of fifteen millions of dollars, if so much shall be necessary, containing an ex-
21 press waiver of all recourse by the holder of the same to any individual liability of the stockholders of this company, shall be made by this company, each bond to be for the sum of $1,000, and to bear seven per cent. per annum interest, payable semi-annually, and the principal to be payable on the first day of April, A. D. 1908, and both principal and interest to be payable in the city of New York. That said bonds shall be dated as made on the twentieth day of February, A. D. 1868, and the semi-annual payments of interest thereon shall be made payable on the first days of April and October in each year. In case default be made in the payment of any half year's interest on any of said bonds, and the warrant for said interest shall have been presented, and its payment demanded, and such default shall have continued for six months

after such demand, without the consent of the holder of said coupon or bond, then and thereupon the principal of all the said bonds shall become immediately due and payable. That a warrant for each semi-annual payment of interest shall be made and authenticated for and on behalf of this company by the secretary of this company, and annexed to each bond. That said bonds shall be prepared by the president of the company, and signed by him for and on behalf of this company, and attested by the secretary, and shall have annexed to them a certificate of authentication of the trustee or trustees under the mortgage made to secure them,
22 and shall not be issued or obligatory without such certificate. That from and after the first day of April, A. D. 1870, and until the maturity of said bonds, there shall be annually created, paid, and deposited with a sinking fund commissioner or commissioners, to be appointed by the board of directors, and to hold office at the pleasure of the board, a sinking fund to aid in the final redemption of said bonds of an amount of money derived from the net earnings of said road and property equal to one-half of one per cent. on the whole amount of said issue of bonds at the time of any such payment outstanding. Said fund and all investments and accounts thereof and its management shall always be under the control of this board, and shall be, from time to time, continually invested by the commissioner or commissioners in the purchase of the said bonds, or in such first-mortgage bonds so to be redeemed, or bonds of the Government of the United States, or of the States of Ohio, Indiana, or Illinois, and kept at interest, and the interest on all of such investments collected and added to and continually compounded with said fund, and the same be used and appropriated eventually and solely to redeem and pay off said issue of bonds thereby provided to be made.

"No bond of said issue purchased by said fund shall thereby be cancelled, but shall with its coupons be stamped as owned by said fund, and it or its amount, if destroyed, shall remain a liability against the
23 company, and the interest be paid to the fund as paid on other bonds and added to said fund until the whole of said issue shall have been absorbed or otherwise paid off, when the whole issue shall be cancelled. Any bonds in said fund at any time may be destroyed by the company, but the annually accruing interest on the amount so destroyed must thereafter be paid to said fund. The bonds and securities belonging to the sinking fund shall be kept in the office of the sinking-fund commissioner or commissioners, which shall be at or near the principal office of said railway company.

"That for the purpose of securing the final payment of said issue of $15,000,000 of consolidated bonds, with all interest to accrue thereon, this company will make and deliver to James A. Roosevelt and William R. Fosdick, as trustees, a mortgage and deed of trust conveying to said persons, as trustees, for the benefit of every holder of such consolidated bonds, or any of them, all the road, property, rights, and franchises of this company of every kind and description whatever, except certain rights, franchises, and chartered privileges held by this company derived from the late Chicago and Great Eastern Railway Company, to build and own and operate a railroad and its appurtenances from Chicago to the Mississippi River, in trust to secure the final payment of said bonds as aforesaid, with all the rights, covenants, powers, and authority in case default

be made by this company in such payments as in said deed of trust
24 shall be specified to foreclose said mortgage, and to sell the property so mortgaged, or to take possession of and operate the same and receive the incomes thereof, but not in any case before any default to disturb or interfere with this company in the possession, control, and management thereof, or from receiving the incomes thereof, or from selling or exchanging any of the personal property, or machinery, or equipments thereof, or any of the lands or real estate not necessary for the use and operation of the railway, as to all of which, as will be in said mortgage and deed of trust specifically stated, agreed upon, and set forth. That the president of this company is hereby authorized and fully empowered to make and sign and execute and seal with the corporate seal of this company the said mortgage and deed of trust, and to acknowledge the same for and on behalf of this company for record, and on the acceptance of said trust, and signing the said deed by the said trustees, to cause the same to be recorded according to law, and thereupon to make, sign, execute, and prepare said $15,000,000 of bonds for issue, exchange, or sale, as shall hereafter be ordered by this board."

And the granting portion of said mortgage is in the following words:

"This indenture witnesseth that the said Columbus, Chicago and Indiana Central Railway Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of
25 one dollar to them in hand paid by the said party of the second part, trustees as aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, doth hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the said James A. Roosevelt and William R. Fosdick, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire railroad of the party of the first part, lying, being, and extending from its terminus, in the city of Chicago, in the State of Illinois, through the county of Cook, in said State, southward to the State of Indiana, and through the counties of Lake, Porter, La Porte, Stark, Pulaski, Cass, Howard, Tipton, Madison, Henry, and Wayne, in Indiana, to the city of Richmond; and thence eastward to the State of Ohio, and through the counties of Preble, Darke, Miami, Champaigne, Union, Madison, and Franklin to the city of Columbus, Ohio, and also extending from the city of Richmond aforesaid, westward through the said counties of Wayne, Henry, Hancock, and Marion to the city of Indianapolis, in Indiana; and also extending from the main line aforesaid, at a point in Miami County, Ohio, westward through the county of Darke, in Ohio, to the Indiana State line at Union City; and thence westward through the counties of Randolph, Jay, Blackford, Grant, Miami, Cass, White, Jasper, and Newton, in Indiana, to the line of the State of Illinois in the direction towards Peoria, altogether being in length of railways about five hundred and eighty-
26 six and one-half miles, about 424½ miles thereof being in the State of Indiana, about 134½ miles thereof being in the State of Ohio, and about 27½ miles thereof being in the State of Illinois, with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels connected

with or used in the using or operating of said railway or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever pertinent thereto.

"To have and to hold the said railway, property, premises, interest, rights, and appurtenances mentioned as aforesaid, and hereby conveyed or intended to be by this conveyance unto the said party of the second part as such trustees as aforesaid, and to their successors in said trust or assigns to and for the only use, benefit, and behoof of the said trustees, and there cestui que trust, their successors and assigns forever, in trust, to secure the payment of said bonds as specially provided."

That on the 3d day of February, 1875, said Roosevelt and Fosdick filed in this court a bill in chancery to protect the rights of the holders of said mortgage bonds. That a receiver was appointed therein at
27 the time of the filing of said bill, and by the order of court was authorized and empowered to collect the rents from the defendant, which were payable under the terms of its said lease, but the said receiver was not to disturb the said P., C. & St. L. R'y Co. in its possession of said property without the further order of court in said cause, and no order directing him to take possession of said mortgaged property has been entered.

To the introduction of said evidence showing the existence of the said mortgage to James S. Roosevelt and William P. Fosdick, counsel for said plaintiffs duly objected, but the court overruled said objection and admitted said evidence; to which ruling of the court counsel for the said plaintiffs then and there duly excepted.

The aforesaid evidences and evidence tending to prove the said several special findings was all the evidence introduced by either party on the trial of said cause.

Thereupon the court, upon said evidence and special findings, found the said defendant not guilty, and upon said finding of not guilty entered judgment for said defendant.

To which finding of not guilty and to which judgment of the court thereon the said plaintiffs then and there duly excepted, but does not except to the special findings of facts.

Inasmuch as the matters and things aforesaid do not appear of record in said cause the said plaintiffs present this bill of exceptions and
28 pray that it may be signed and sealed by the court and made a part of the record of said cause.

And it is done accordingly.

H. W. BLODGETT, *Judge.*

Consented to:

E. WALKER,
Att'y for Def't.

(Endorsed:) Filed July 8, 1880. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 20th day of September, A. D. 1880,

said defendant, by his solicitor, filed in said clerk's office his bond in said-entitled cause, which said bond is in the words and figures following, to wit:

Bond.

29 Supreme Court of the United States.

HARRIET SKIDMORE, LEMUEL SKIDMORE, AND William B. Skidmore,
vs.
PITTSBURG, CINCINNATI AND ST. LOUIS RAILway Company.
} Bond.

Know all men by these presents that we, Harriet Skidmore, Lemuel Skidmore, and William B. Skidmore, as principals, and James B. Bond, of the county of Queens, in the State of New York, as surety, are held and firmly bound unto the Pittsburg, Cincinnati and St. Louis Railway Company, a corporation of the State of Ohio, in the penal sum of five hundred dollars, to be paid to the said Pittsburg, Cincinnati and St. Louis Railway Company, its successors or assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals; dated this ninth day of August, A. D. 1880.

Whereas the above-named Harriet Skidmore, Lemuel Skidmore,
30 and William B. Skidmore have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Harriet Skidmore, Lemuel Skidmore, and William B. Skidmore shall prosecute their said writ of error to effect, and answer all damages and costs, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HARRIET SKIDMORE. [SEAL.]
LEMUEL SKIDMORE. [SEAL.]
WM. B. SKIDMORE. [SEAL.]
JAMES B. BOND. [SEAL.]

Sealed and delivered in the presence of—as to Lemuel Skidmore & James B. Bond—

WM. SCHNEIDER.

As to Wm. B. Skidmore—

E. H. MANDELL.

As to Harriet Skidmore—

MARY L. DICKINSON.

Satisfactory.

E. WALKER,
Att'y for Def't.

Approved:

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Sept. 20, 1880. Wm. H. Bradley, cl'k.

31 NORTHERN DISTRICT OF ILLINOIS, *sct:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Harriet Skidmore et al. are the plaintiffs and Pittsburg, Cincinnati and St. Louis Railway Company are the defendants, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 14th day of October, A. D. 1880, and of our Independence the 105th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

32 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between Harriet Skidmore, Lemuel Skidmore, and William B. Skidmore, plaintiffs, and Pittsburg, Cincinnati and St. Louis Railway Company, defendant, in an action of ejectment, a manifest error hath happened, to the great damage of the said Harriet Skidmore, Lemuel Skidmore, and William B. Skidmore, as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1880, in the Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this eighth day of July, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the 105th year.

[SEAL.] WM. H. BRADLEY,
Clerk of Circuit Court U. S., Nor. Dist. of Illinois.

(Indorsed:) Supreme Court of the United States. Harriet Skidmore et al. vs. Pittsburg, Cincinnati and St. Louis R'y Co. Writ of error.

33 UNITED STATES OF AMERICA, *ss:*

To the Pittsburgh, Cincinnati and St. Louis Railway Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the northern district of Il-

linois, wherein Harriet Skidmore, Lemuel B. Skidmore, and William B. Skidmore are plaintiffs, and you are defendant in error, to show cause if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness Henry W. Blodgett, dist. judge, presiding on trial of said cause, this 27th day of September, in the year of our Lord one thousand eight hundred and eighty.

H. W. BLODGETT, *Judge*.

34 Received copy of the foregoing citation and service of same acknowledged this 27th day of September, A. D. 1880.

E. WALKER,
Att'y for Def't.

(Indorsed) Supreme Court of the United States. Harriet Skidmore, et al. vs. Pittsburg, Cincinnati and St. Louis Railway Company. Citation.

(Indorsement on cover:) No. 140. Harriet Skidmore, Lemuel Skidmore, and William B. Skidmore, plaintiffs in error, vs. The Pittsburg, Cincinnati & St. Louis Railway Company. N. Illinois C. C. U. S. Filed 16th October, 1880.

112-33

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1883.

HARRIET SKIDMORE ET AL.,
Plaintiffs in Error,

vs.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY,
Defendant in Error.

In Error to the Circuit Court for the Northern District of Illinois.

BRIEF AND ARGUMENT

BY

GEORGE WILLARD,
Of Counsel for Plaintiffs in Error.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1883.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1883.

HARRIET SKIDMORE ET AL., *Plaintiffs in Error,* vs. THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY, *Defendant in Error.*	In Error to the Circuit Court for the Northern District of Illinois.

STATEMENT.

This is a suit in ejectment, instituted in the Circuit court of the United States, for the Northern District of Illinois, January 8, 1877, by the plaintiffs in error against the defendant in error, railway company, to recover certain city lots located in the city of Chicago.

The declaration avers that the plaintiffs in error on the 6th day of May, 1876, were possessed of the real estate in question, which they claimed in fee, and that the defendant in error ejected the plaintiffs therefrom and unlawfully withheld possession thereof. The defendant pleaded the general

issue. A trial in June, 1879, resulted in a finding and judgment for the defendant in error. The judgment was afterwards set aside and a second trial took place in April, 1880, resulting also in a finding and judgment for the defendant. It is upon that judgment that this writ of error is prosecuted.

The facts of the case as found by the court, from the evidence introduced by the plaintiffs in error (printed Rec., 6 and 7), are substantially as follows:

1. That the Columbus, Chicago and Indiana Central Railway Company, a railroad corporation of Illinois, became February 2, 1872, the owner in fee of lots 1 to 11, both inclusive, and lots 14, 15 and 16, in block 6, Carpenter's addition to Chicago, and on May 31, 1872, the owner in fee of lots 7, 8, 9, 10 and 11, in block 4, Magee & High's addition to Chicago, Cook county, Illinois.

2. That on April 19, 1873, William B. Skidmore recovered a judgment against said Columbus, Chicago and Indiana Central Railway Company for the sum of $6,830.94, in the Circuit court of Cook county; that execution was issued on said judgment and on the 10th of June, 1873, the same was levied upon all said railway company's interest in said lots; that pursuant to said levy and due advertisement said lots were offered for sale at public vendue to the highest bidder, for cash, by the sheriff, on the 3d day of July, 1873; that said William B. Skidmore, being the highest and best bidder therefor, said lots were struck off and sold to him by the sheriff, and a certificate was issued and duly recorded July 19th, 1873.

3. That said premises were not redeemed from said sale, and on the 3d day of May, 1876, the sheriff executed,

acknowledged and delivered a deed of conveyance of said premises to the plaintiffs in error, who are the only heirs at law of said William B. Skidmore, deceased, late of the city, county and state of New York; that said William B. Skidmore died subsequently to his purchase of said premises and before the execution of said deed, and that said deed was duly recorded on the 11th day of May, 1876.

4. That the premises in controversy are worth more than the sum of $5,000.

The facts, as found by the court from the evidence introduced by the defendant in error, are substantially as follows (Rec., 7 to 11):

That in the spring of 1868, the Columbus, Chicago and Indiana Central Railway Company, the execution debtor, bought the property upon time contracts, by which the purchase money was to be fully paid within four years, and then a deed in fee simple was to be made. That the company thereupon entered into possession of the property, and erected thereon its engine houses, shops and side tracks, and has continued to use the same by itself and its lessees in connection with the use and operation of its railroad, and still uses the same for that purpose, and that the same is necessary to the use and operation of said road; that said company has paid all taxes and assessments on said lands by itself and its lessees since said contracts of purchase, and in all respects acted as owner thereof.

That on the 1st day of February, 1869, the Columbus, Chicago and Indiana Central Railway Compay leased its railway and property for the term of ninety-nine years to the defendant, a railway corporation of the State of Ohio,

which lease was recorded in Cook county, Illinois, July 21, 1873. "That said lease does not purport to convey "after acquired property, but that the premises in ques- "tion are now occupied and used by it for railway pur- "poses the same as though included within the terms of "said lease."

That on the 20th day of February, 1868, said Columbus, Chicago and Indiana Central Railway Company executed, acknowledged and delivered to Roosevelt and Fosdick a trust mortgage to secure bonds to the amount of $15,000,000, which mortgage was recorded in Cook county, Illinois, March 7, 1868.

That said mortgage was executed by authority of the board of directors of said company, of which the following is a copy:

The record then sets out the preamble and resolution of the board of directors to mortgage "all the property, "rights and franchises" of the company, and authorized the president of the company to execute such a mortgage. Then follows in the record the granting portion of the mortgage purporting to convey all the property which the company then "had, owned or possessed, or might "thereafter acquire, either in law or equity, * * * * "in trust to secure the payment of said bonds, as specially "provided."

That on the 3d day of February, 1875, said Roosevelt and Fosdick filed in the Circuit court of the United States, for the Northern District of Illinois, "a bill in chancery "to protect the rights of the holders of said bonds." That a receiver was thereupon appointed, and by order of the court was authorized to collect the rents from the defendant, which were payable under the terms of the

lease, but the receiver was not to disturb the lessee, Pittsburgh, Cincinnati and St. Louis Railway Company, in its possession, without the further order of the court, and that no such further order had been entered.

Assignment of Errors.

The plaintiffs in error assign the following matters, and each of them, for error:

1st. The court erred in finding the defendant not guilty, and entering judgment on said finding.

2d. The court erred in admitting evidence of the said mortgage to Roosevelt and Fosdick.

BRIEF.

The questions raised in this record affect the title to real estate, and therefore involve a rule of property; and it may be stated as an antecedent and underlying proposition that in such cases it is the settled doctrine of the federal courts to follow the statutes of the state and the decisions of the state courts.

Ross v. *Doe*, 1 Pet., 655.
Miles v. *Caldwell*, 2 Wall., 35.
Nichols v. *Levy*, 5 id., 433.
Williams v. *Kirtland*, 13 id., 306.
Boyce v. *Tabb*, 18 id., 546.
Brine v. *Ins. Co.*, 6 Otto, 627.
Taylor v. *Ypsilanti*, 15 id., 60.
Hammock v. *Loan & Trust Co.*, 15 id., 77.

I.

THE COURT ERRED IN FINDING THE DEFENDANT NOT GUILTY, AND ENTERING JUDGMENT ON SAID FINDING.

The facts as found by the court show, as we shall endeavor to maintain, that in law the plaintiffs in error had the paramount title, and had also the right of possession of the land in question. If we shall succeed in maintaining these two propositions, then the error as above assigned will have been established.

1. *The title which the plaintiffs in error exhibited in themselves is paramount to the title exhibited by the defendant in error.*

Chapter 77 Rev. Statutes Illinois 1874, page 621, entitled "Judgments, Decrees and Executions," shows the material provisions of the law in force when the real estate in question was levied on and sold and the sheriff's deed executed and delivered.

We quote therefrom as follows:

"SECTION 1. LIEN OF JUDGMENT. *Be it enacted by the "People of the State of Illinois, represented in the General "Assembly*, That a judgment of a court of record shall be "a lien on the real estate of the person against whom it "is obtained, situated within the county for which the "court is held, from the time the same is rendered or re-"vived, for the period of seven years, and no longer; *pro-"vided*, that there shall be no priority of the lien of one "judgment over that of another rendered at the same "term of court or on the same day in vacation. When "execution is not issued on a judgment within one year "from the time the same becomes a lien, it shall thereafter "cease to be a lien; but execution may issue on such "judgment at any time within said seven years, and shall "become a lien on such real estate from the time it shall "be delivered to the sheriff or other proper officer to be "executed.

"SEC. 3. DEFINITION OF 'REAL ESTATE.' The term "'real estate,' when used in this act shall include lands, "tenements, hereditaments and all legal and equitable "rights and interests therein and thereto, including estates

"for the life of the debtor or of another person and estates "for years, and leasehold estates when the unexpired term "exceeds five years."

"SEC. 4. EXECUTION. The person in whose favor "any judgment as aforesaid may be obtained, may have "execution thereon in the usual form, directed to the "proper officer of any county in this state, against "the lands and tenements, goods and chattels of the per- "son against whom the same is obtained, or against his "body, when the same is authorized by law."

"SEC. 10. WHAT LIABLE TO EXECUTION. All and "singular the lands, tenements, real estate, goods and "chattels (except such as is by law declared to be ex- "empt), of every person against whom any judgment has "been or shall be hereafter obtained in any court of rec- "ord for any debt, damages, costs or other sum of money, "shall be liable to be sold upon execution to be issued "upon such judgment."

"SEC. 11. ELECTION OF PROPERTY. The person in "whose favor execution is issued may elect on what prop- "erty not exempt from execution he will have the same "levied, provided personal property shall be last taken."

"SEC. 16. CERTIFICATE. When any real estate is "sold by virtue of an execution, judgment or decree of "foreclosure of mortgage or enforcement of mechanic's "lien or vendor's lien, or for the payment of money, it "shall be the duty of the sheriff, master in chancery, or "other officer, instead of executing a deed for the prem- "ises sold, to give to the purchaser a certificate describing "the premises purchased by him showing the amount "paid therefor, or if purchased by the person in whose "favor the execution or decree is, the amount of his bid,

"the time when the purchaser will be entitled to a deed, "unless the premises shall be redeemed as provided in "this act."

"SEC. 17. CERTIFICATE—RECORDER — EVIDENCE. "The sheriff, master in chancery or other officer making "the sale shall within ten days from such sale file in the "office of the recorder of the county in which the prop- "erty is situated, a duplicate of such certificate, which "shall be recorded by such recorder; and such a certifi- "cate or duplicate, or record and certified copy of the "record thereof shall be evidence of the facts therein "stated."

"SEC. 30. DEED, WHEN AND HOW MADE—LIMITA- "TION. When the premises mentioned in any such certi- "ficate shall not be redeemed in pursuance of law the legal "holder of such certificate shall be entitled to a deed there- "for at any time within five years from the expiration of the "time of redemption. The deed shall be executed by the "sheriff, master in chancery or other officer, who made "such sale, or by his successor in office, or by some person "especially appointed by the court for the purpose. If the "time of redemption shall have elapsed before the taking "effect of this act a deed may be given within two years "from the time this act shall take effect. When such deed "is not taken within the time limited by this act the cer- "tificate of purchase shall be null and void, but if such "deed is wrongfully withheld by the officer, whose duty "it is to execute the same, or if the execution of such "deed is restrained by injunction or order of a court or "judge, the time during which the deed is so withheld or "the execution thereof restrained shall not be taken as "any part of the five years within which said holder shall "take a deed."

"SEC. 32. EFFECT OF DEED. Such deed shall convey to the grantee therein named all the title, estate and interest of the person against whom the execution was issued of every nature and kind in and to the premises thereby conveyed, but such deed shall not be construed to contain any covenant on the part of the officer executing the same."

"SEC. 33. DEED—EVIDENCE. Any deed which has been heretofore or which may hereafter be so executed, or a certified copy of the record thereof, shall be *prima facie* evidence, that the provisions of the law in relation to the sale of the property for which it is or may be given were complied with; and in case of the loss or destruction of the record of the judgment or decree or of the execution or levy thereon such deed or certified copy of the record thereof shall be *prima facie* evidence of the recovery and existence of the judgment or decree and issuing and levy of the execution as therein recited."

Sec. 29, Chapt. 90, entitled "Revised Statutes," Rev. Statutes 1845, page 472, provides as follows:

"SECTION 29. The word 'person' or 'persons' as well as all words referring to or importing persons shall be deemed to extend to and include bodies politic and corporate as well as individuals."

This provision may also be found in Gross' Statutes of Illinois, vol. 1, chap. 90, sec 11, p. 653.

Gross' Statutes, consisting of three volumes, contain all the laws as they stood at the time of the revision of 1874. In the revision of 1874, the above section was changed, the word "may" being substituted for the word "shall."

See p. 1011; Rev. Stat. 1874, paragraph 5, sec. 1, chap. 131, entitled "Statutes."

Section 10, article xi, constitution 1870, provides as follows:

"The rolling stock and all other movable property be-
"longing to any railroad company or corporation in this
"state shall be considered personal property, and shall
"be liable to execution and sale in the same manner as
"the personal property of individuals, and the general as-
"sembly shall pass no law exempting any such property
"from execution and sale." (See Revised Statutes 1874, page 79.)

The foregoing statutory provisions necessarily include railway companies. Section 10, aforesaid, is explicit. It says, that all and singular the lands, tenements, real estate, goods and chattels (except such as is by law declared to be exempt) of *every person* against whom a judgment has been or shall be hereafter recovered *shall be liable* to be sold upon execution issued upon such judgment. And section 29 aforesaid, expressly provides that the word "person" or "persons" *shall* be deemed to extend to and include bodies politic and corporate as well as individuals.

The state constitution expressly provides that the personal estate of railway companies shall be liable to execution and sale, the same as in case of individuals. And the statute, section 11 aforesaid, expressly provides that such property shall be last taken.

It will thus be seen that the personal property of railway companies, including the rolling stock, is expressly

made liable to sale on execution, but that to reach the personal property of a judgment debtor resort must first be had to the real estate.

No provision is found in the statutes declaring the property of railway companies exempt from levy and sale on execution. Nor do we find in the adjudicated cases any such declaration.

It will be observed that from the facts found by the court, there are situated upon the lands in question, "engine houses, shops, structures and side-tracks necessary "for the operation of the railroad." The court did not find that the use of those improvements was absolutely necessary for the operation of the road. But even if the record disclosed such a finding it ought not to render ineffectual the plain provisions of the statute, making the real estate of every person and corporation subject to levy and sale on execution.

The adjudicated cases show that the real and personal property of individuals and railway companies are alike subject to levy and sale on execution in the state of Illinois. We cite the following decisions of the Supreme court, and quote from the opinions therein fully enough to show the spirit of the people of the state, as evidenced through the judicial department.

In *Palmer* v. *Forbes et al.*, 23 Ill., 301, decided in 1859, the plaintiffs below (Palmer *et al.*), as trustees, brought replevin for certain locomotives, miscellaneous iron, locomotive tires, car axles, car wheels and casks of oil upon which an execution had been levied. The plaintiffs below claimed title to the property by virtue of a deed and actual possession thereunder, given in consideration of an indebtedness evidenced by several mortgages

under which default had been made. The several mortgages upon which default had been made were not executed in conformity with the provisions of the statute concerning chattel mortgages, and the court therefore held that they could not in that respect be upheld as against judgment creditors; but that the plaintiffs, Palmer *et al.*, as trustees, having taken *actual* possession of all the property in question *before* the rendition of the judgment upon which the defendants below (Palmer and others) had execution and levy, the lien of the judgment creditors was therefore subject to the lien of the mortgagees. This, of course, was upon the ground that the actual possession answered the purpose of a *notice* to third persons, the same as would a chattel mortgage when duly recorded.

In deciding the case it was necessary for the court to determine what was real and what was personal property in respect to that used by a railroad company for the operation of the road.

The court held that "the rolling stock, rails, ties, chains, "spikes, and all other material brought upon the ground "of the company incumbered by the mortgage and de- "signed to be attached to the realty, should be considered "as a part of the realty, and incumbered by the mortgage "as such; but fuel, oil, and the like, which are designed "for consumption in the use, and which may be sold and "carried away, and used as well for other purposes as in "the operation of the road, and when taken away have no "distinguishing mark to show that they were designed "for railroad uses, cannot be treated or considered as "anything but personal property, and subject to and "governed by the law applicable to such property."

We quote further from the opinion to show, that in the

absence of special legislation, railroad property is to be treated in law the same as that of individuals:

"Railroad companies can only issue these mortgages "in pursuance of a power conferred upon them by their "charters or some general statute. Hence, it is of primary "importance in the first instance to see what the law is "under which a mortgage is executed. The charter of "this road authorized it to issue bonds and 'secure the "payment of the same by mortgage or deed of trust, on "the whole or any part of the road, property and income "of the company then existing or thereafter to be acquired.' "Nowhere do we find any provision made as to the mode "of acknowledging or recording these mortgages, or of "the effect they shall have upon the rights of subsequent "purchasers or creditors. This seems to have been left "by the legislature to be influenced and controlled by the "general law of the state on the subject. The road and "property of the company may include its personal "property as well as the real estate, consisting of the "road and its appurtenances. As there is no specification "as to how the personal property shall be mortgaged, "the general law regulating chattel mortgages is left to "regulate the mode of executing that power. *There is "as much propriety in defending and protecting the rights "of third persons who deal with railroad companies, as "there is of those who deal with individuals who possess "the same natural rights and powers which have by law "been imparted to these corporations, and there is nothing "in our legislation indicating an intention to make any "distinction*, except in a few special cases where charters "have made special exceptions, as in the case of the "St. Louis, Alton and Chicago Railroad Company, where "the fourth section of the charter of which provides, that

"the mortgages upon personal property of the company "shall be valid liens thereon, although not acknowledged, "as required by our chattel mortgage law. How far "this would dispense with conformity to other provisions "of that statute, is not necessary now to inquire. Where "a charter or a general law of the state authorizes a "railroad company to mortgage either its real or personal "estate, and provides no mode of execution or recording, "and specifies no form for the instrument, and declares "no effect which it shall have upon the rights of the "parties or others, it would seem to follow, necessarily, "that such mortgages must be subject to and governed "by the general laws of the state regulating mortgages; "at least so far as the general laws are applicable to the "subject matter of the mortgage."

In *Hunt, Trustee, etc.*, v. *Bullock et al.*, 23 Ill., 320, decided in 1860, the appellant Hunt filed a bill in the court below to restrain the appellees from selling on execution certain fuel and office furniture of the Terre Haute, Alton & St. Louis Railroad Company, to satisfy certain judgments. The claim being that the property was a part of the company's real estate, and passed to the appellant as trustee under certain mortgages given by the company.

It was held that the property in question was personal property, and that the title to it did not pass by virtue of the mortgage, for the reason that it was not executed in accordance with the statute concerning chattel mortgages.

We respectfully ask the court to read the opinion in this case, as correctly reflecting the spirit and sentiments of the people of the state at the present time. The idea that a corporation had rights not accorded to the indi-

vidual man, was abhorrent to the court, as note the following quotation. Speaking to the question whether the property in controversy was real or personal, the court said:

"As between individuals, such property has never been "regarded as real estate or fixtures, but has in all condi- "tions, and under all circumstances, and for every pur- "pose, been regarded as what it simply is, personal "property. These distinctions are so plain and familiar "that every class of men, in their business affairs, act "upon and conform to them. If, as between individuals, "a court were to announce a contrary rule, it would "startle every class of men as new and unheard of in our "system of jurisprudence." * * * "*Such has never "been claimed for individuals, and no reason is perceived "in justice or upon principle why corporate bodies have "any higher or greater claims to such exemptions.* They "are unquestionably, outside of their charter privileges, "entitled to the benefits of the rules of law, as are indi- "viduals, *but to nothing more.*"

Speaking with reference to the franchise on account of which it was claimed the property should be deemed a part of the company's real estate, the court said:

"What, then, is this franchise which it is claimed may "transmute personal into real estate, and change the very "nature and use of things in such a manner? It is only "an immunity, privilege or exemption from the ordinary "burthens and restrictions to which the citizens of the "state or government are generally subject, and is usually "granted to bodies corporate or politic for public conven- "ience. * * * This privilege they have always been held "amenable to, *and are governed by the general laws of the*

"state to the same extent and in the same manner as indi-
"viduals. The courts are powerless to extend their privi-
"leges beyond the grant contained in their charter, either
"in express terms or from necessary implication, to effectu-
"ate the objects of their creation. These are their vested
"rights, and we are determined that, so far as this court
"has the power, they shall always be protected in their
"enjoyment, but in protecting their rights we must not
"override other equally sacred and important rights be-
"longing to indivíduals." * * *

"The law prohibits *indivíduals* from making such a "mortgage as this, and declares them fraudulent, and no "one would pretend as between individuals that it could "protect property thus situated. This we have often de-"cided. This no one has doubted. *And it would seem "that every known principle of law and of natural justice "requires that the same rule should be applied to incorpora-"tions."* * * * * * *

"It may be urged that public policy requires that we "should, in despite of the statute, give effect to these instru-"ments and hold such bodies are not required to comply "with this and other statutes, or that their property must "be treated as franchise, and therefore exempt from exe-"cution in discharge of their debts. It is no doubt right "and proper that the legislature should afford all reason-"able immunity to this large and important class of inter-"ests, and that courts should fairly apply the law so as "to deprive them of none of their rights: *but sound pol-"icy can never require courts to warp the law to pro-"tect one class of indivíduals at the expense of another. "Public policy requires courts to declare the law as it "is."* * * * * * *

"These bodies can contract debts alone by legislative

*"authority, and until that body shall declare what exemp-
"tions they are to enjoy, courts are powerless, even if they
"were desirous, to afford relief against the operation of the
"law. The plain and simply duty of the courts is to ad-
"minister the law as it is; and this is the broad shield
"that protects the weak against the powerful, and the
"poor against the affluent."*

In *Bruffett et al.* v. *Great Western R. R. Co. of 1859*, 25 Ill., 353, decided in 1861, the plaintiff sued upon a contract made with the defendant's predecessor, a corporation chartered as the Great Western Railroad Company, which company had previously owned and operated the road and property then held by the defendant, the plaintiffs claiming that the defendant's charter was but a re-incorporation of the previous company.

The court held that the charter and franchises of the old company still remained to it, and were distinct from the charter and franchises of the defendant. We quote from the opinion as follows:

"In case this company had become insolvent and legally
"transferred its charter, rights, franchises, privileges and
"property, and the purchasers become again incorpor-
"ated, the new company would not be liable for the un-
"paid debts of the old organization. But after a transfer
"of all the property the charter and franchises would still
"remain in the incorporation, and could not be sold unless
"authorized by legislative enactment."

"Debts incurred by an incorporation cannot be released
"or transferred by legislative enactment. The legislature
"has no competent power to release or discharge any
"such body from their legal liabilities to individuals,
"whether incurred by contract, forfeiture or penalty.

"When individuals enter into contracts with such bodies "they have the undoubted right to resort to the appro- "priate remedies to compel a performance, or to recover "damages for a breach of the agreement. *For the pur-* "*poses of acquiring satisfaction of any judgment they may* "*recover, they may resort to their property as to that of* "*individuals.*"

In *Titus et al.* v. *Mabee et al.*, 25 Ill., 257, decided in 1861, the appellants, Titus and others, filed a bill to restrain the sale of a freight car, an iron safe, and a planing machine, which had been levied upon as personal property, to satisfy executions issued upon judgments against the St. Louis, Alton and Chicago Railroad Company. The complainants claimed that they held a mortgage covering all of the company's real and personal property. The bill prayed for an injunction, and a temporary one was granted restraining the sale. A final order was afterwards entered dissolving the injunction, from which order the complainants appealed. The Supreme court held that the safe and planing mill were personal property, and that it not appearing that it belonged to the company at the time the mortgage was executed, the decree of the lower court was correct as to those articles. That if the freight car was upon the road at the time the levy was made upon it then it formed a part of the realty, and the officer would have no right to detach it from the realty, and that his having done so did not make it personal property. But that if the car was not on the company's road at the time of the levy then it was personal property and subject to levy as such. The court therefore modified the decree by continuing the injunction as to the car, for a hearing upon the question whether it had become detached from the realty. The case of *Titus et al.* v. *Gilheimer et al.*, 27

Ill., 462, is to the same effect. We quote from the opinion, as follows:

"The various legal propositions involved in this record "were discussed and determined in the case of *Titus* v. "*Mabee*, 25 Ill., 257, at the present term, and it is there- "fore deemed unnecessary to again discuss them here. "It was there held that railroad cars and locomotives were, "when on the road for use, *prima facie* a part of the "realty, and could not be severed and sold by the officer "under an execution. This bill alleges that the sheriff "was threatening to seize and sell the cars, locomotives "and other property of the road, under an execution in "his hands, and prays that he and the plaintiffs in execu- "tion may be restrained. Also, that a constable under "an execution from a justice of the peace had levied upon "a tank-house belonging to the road, and was proceeding "to sell it. All buildings and improvements of a perma- "nent character, placed upon or annexed to the freehold, "usually become a part of it, and can only be separated "from it by the owner.

"That a railroad tank-house is of that character, is un- "questionably true, and as such is not subject to levy and "sale by a constable on an execution from the justice of "the peace. His authority is only to seize and sell goods "and chattels, and when he attempts to sell real estate "or permanent fixtures, he acts in excess of his authority, "and may be restrained by injunction. The court below "erred in sustaining the demurrer, and dismissing the "bill. Until the evidence was heard, the presumption is "that the tank-house, the cars and locomotives, were an- "nexed to and formed a part of the real estate of the "road. If, after hearing the evidence, it had appeared "they had been and then were severed from the track

"and premises of the road, the bill should have been dis-
"missed. The decree of the court below dismissing the
"bill is reversed, and the injunction restraining the sale
"of the cars, locomotives and tank-houses, is continued
"until a hearing, and dissolved as to other property, and
"the cause is remanded."

In *Maus* v. *Logansport, Peoria and Burlington Railroad Co. et al.*, 27 Ill., 77, *et seq.*, decided in 1862, the plaintiff in error, Maus, as county treasurer and *ex-officio* collector of Tazewell county, was enjoined by decree in the court below from taking up and carrying away from the defendant's road-bed the iron rails constituting the track of said company, and selling the same for taxes which were due to the state.

It was admitted, upon the trial, that the railroad company was duly incorporated, and owned and operated a line of railway for the transportation of passengers and freight, and the United States mail, from the Mississippi river to the Indiana state line, where it connected with another road leading to Logansport, and that there was no other parallel line by which the mails could be carried.

The Supreme court held, reversing the decree below, that under the statute the railroad track was personal property, and, therefore, might be levied upon, taken up and removed, and sold for taxes.

We quote from the opinion as follows:

"It is true they (the tracks) are stationary and fixed,
"but surely it will not be contended that although fixtures
"of a certain kind, which by the common law are deemed
"a part of the freehold, and cannot be removed, that the
"legislature may not destroy this character and make

"them personal property, liable to be sold for taxes or "upon execution to pay a private debt." * * * *

"It cannot be denied that this 'fixed and stationary "personal property' is liable for the taxes assessed upon "it—the defendants do not deny that—it follows then, like "all other property, it is liable to be sold for the assess- "ments." * * *

"In taking personal property for taxes, the collector in "all cases has a right to remove the property. His right "to do so cannot be questioned, and it is no argument "against it that he may exercise it in a riotous manner or "at an improper hour. * * *

"*We know of no principle that will exonerate an indi-* "*vidual from the prompt payment of his taxes if he has* "*property out of which they can be made, nor of any ap-* "*plicable to railroad corporations, however conducive they* "*are admitted to be to the development of the resources of* "*the state, or however necessary to the transaction of its* "*widely extended business.*" * * *

"Was such a provision found in the act regulating "sales on execution, or in the law regulating chattel mort- "gages, or had the legislature declared in these statutes "this description of fixtures to be 'fixed and stationary "personal property,' then it would assume the attributes "of personalty for these several purposes."

In *Smith* v. *Chicago & Alton Railroad Co.*, 67 Ill., 191, decided in 1873, the Supreme court held that ejectment would lie against the railroad company for land occupied as a part of the track of their railroad, such land not having been acquired from the owner either by condemnation or purchase. It was insisted on behalf of the railroad company that they, having actual possession of the

land upon which they had laid their track and were running cars thereon for the public convenience, that the owner could not disturb the possession, but should by *mandamus* compel a condemnation of the land, but the court held the contrary and reversed the judgment below. We quote from the opinion as follows:

"No proceedings were ever commenced against the "owner to justify the entry upon his land, building a "railroad upon it, and using it for such purpose. We "are at a loss to understand why ejectment will not lie in "such case, unless it is conceded such corporations have "rights and immunities not accorded to the individual "man. That they can enter upon and take and keep "possession of the land of another, on which their char-"tered powers have not been exercised, with impunity, is "inconceivable to us, and cannot be admitted. Such a "claim strikes fatally at the foundation of property rights, "leaving them valuless. *Doing this under the pretense "that these corporations are* quasi *public institutions gives "no additional force to the pretension*, for the state itself "cannot, dare not, take possession of the property of the "citizen and subject it to their own public uses and wants, "unless it be in the exercise of the power of eminent "domain, and in the mode prescribed by the constitution "and laws enacted in conformity therewith.

"Here the corporation has, without authority of law, "taken possession of appellant's land, and the question is, "shall they be allowed to rob appellant at defiance and "compel him to institute proceedings by which he is to "be deprived of his land? Two remedies, it seems to us "were open to appellant—this action of ejectment, or an "action to recover the value of the land taken. He has

" resorted to the first, and we have been unable to see " why he should not recover."

In *Peoria and Rock Island Railroad Co.* v. *Mitchell*, 74 Ill., 394, decided in 1874, it was contended that it was error in the court below to award execution on a judgment against the railroad company for the value of land taken for railroad purposes. We quote from the opinion of the court as follows:

" Appellant says, under the charter, the company have " a right to tender the money and receive a deed. The " awarding of an execution in no wise prevents appellant " from tendering the money, and if appellee refuses to re- " ceive it the court would stay the execution, but if they " fail to make the tender, he should have the power to ob- " tain the money for the land of which he has been de- " prived, and which the company without paying for have " appropriated to their use. *And the only effectual means " known to the law is by execution for the money, or pro- " ceedings to recover the land.*"

The spirit of the foregoing decisions has been modified to the extent only of holding that the chattel mortgage act—and the act allowing redemptions from sales under decrees—is not applicable to railway mortgages and judicial sales thereunder.

Hammock v. *Trust Co., supra.*

Peoria & Springfield R. R. Co. v. *Thompson*, 103 Ill., 187.

Cooper et al. v. *Corbin et al.*, 105 Ill., 224 (unreported).

So far as we have been able to ascertain, it has never been held that the personal or real estate of railways situated in this state cannot be sold on execution, as in the

present case. Whereas, all the decisions cited tend to show that such a sale is permissible as in other cases.

It will be seen from the foregoing adjudicated cases that the state Supreme court, although repeatedly urged to hold, from considerations of public policy, that railway property is exempt from sale under the general law relating to execution sales, have held the contrary notwithstanding railways are public highways, upon and over which the United States mail is carried, and to the continued operation of which roads the commercial relations of its citizens largely depend.

The views of the court as expressed in every decision cited, shows that railway property, both real and personal, must be held under the general laws of the state relative to execution sales, subject to the same remedies as the property of individuals. Such we think must have been and is now, the general understanding of the people of the state.

It appears, however, that the court held in 1861, that railway cars and locomotives were a part of the real estate of a railway company, and, therefore, could not be levied on and sold as *personal property*. The decision of the court in that respect seemed, doubtless, at variance with the rule as applied to individuals, and hence a few years later, upon a discussion of the subject by the people it was enacted as fundamental law, that cars and locomotives of railway companies should be deemed personal property and liable to execution as such. That provision of the constitution changed, of course, the rule as adopted by the Supreme court, and left, as we respectfully submit, railway property, both real and personal, in the state

of Illinois, subject to the same remedies by the judgment creditor as the property of individuals.

Holding to the rule of property, the question as to what other courts have decided has not, nor has the question of the policy of the legislation and judicial decisions hereinbefore referred to, any place in this argument. Had such questions a place here, we should claim that the policy of the state as now established by law was eminently wise and just. The right to exercise in a small degree sovereign powers would not be granted to railway companies by the state if it were anticipated that such companies might thereby shield themselves from the operation of general laws to the injury of individual persons. Such a shield cannot be essential to the welfare of the state. If the stockholders and managers of railway property incur an indebtedness and fail to discharge the same, but allow judgment to go against them and their property to be sold on execution, and allow the time of redemption to go by without reclaiming the property, why should they any more than individuals be saved from the legitimate result of their own unjust and illegal conduct?

As to other creditors, if there are any holding prior liens, the sale on execution will not affect their rights, and creditors holding subsequent liens may save their rights by themselves redeeming, if the judgment debtor shall not have done so. Thus all parties may be protected.

It seems that the aggregation of capital should never be allowed to operate to place it beyoud the reach of ordinary legal process, and thus beyond the reach of the aggrieved citizen acting single-handed and alone.

Thus much as to the title exhibited by the plaintiffs in

error. Inquiry may now be made as to the title exhibited by the defendant in error.

Upon this point we wish to suggest as an underlying proposition that the rights of the receivers to the property covered by the mortgage are equitable, whereas the rights of the plaintiff in error are legal.

In ejectment, legal rights must be held to prevail over equitable rights.

Chiniquy v. *Catholic Bishop*, 41 Ill., 148.
Rountree v. *Little*, 54 *id.*, 323.
Fisher v. *Eslaman*, 68 *id.*, 78.

Of course, the lease did not evidence ownership of the fee to the lands. The effect of the lease related entirely to the question of right of possession.

The defendant claimed as lessee of the Columbus, Chicago and Indiana Central Railway Company. If, therefore, the sheriff's deed was operative, the plaintiffs in error succeeded to all the title and interest which the lessor possessed in the property levied on, and thereby became entitled to be deemed in law the defendant's lessor to that extent.

It is, of course, a well recognized rule that a lessee cannot call in question the lessor's title.

As between the Columbus, Chicago and Indiana Central Railway Company, as mortgagor, and Roosevelt and Fosdick, as mortgagees, the former, before execution of the sheriff's deed, must be deemed the owner of the fee.

Fitch et al. v. *Pinckard et al.*, 4 Scam., 69.
Hall et al. v. *Lance et al.*, 25 Ill., 277.
Moore v. *Titman*, 44 *id.*, 367.

And the same relation would be sustained between the

mortgagor's grantee, the plaintiffs in error, and the mortgagees, Roosevelt and Fosdick.

It is immaterial to here inquire whether the mortgage in question conveys after acquired property, or whether the property in question was acquired after the execution of the mortgage. In a case properly involving those points we should expect a decision favorable to the plaintiffs in error.

We submit, therefore, that the plaintiffs in error exhibited a paramount title, and the only remaining question is whether they were then entitled to possession.

2. *The plaintiffs in error showed a right of possession in themselves.*

Of course the defendant in error as lessee or operator of the railway could not question the title of its lessor the Columbus, Chicago and Indiana Central Railway Company. It is true that the mortgagees claimed under the lessor, but a mortgage even after condition broken is not such an outstanding title as that a stranger can take advantage of it to defeat a recovery by the mortgagor, or one claiming under him. It was expressly so held in *Hall* v. *Lance et al.*, 25 Ill., 250. In that case the defendant, Lance, was a tenant of Howard who as owner had executed a mortgage on the property to one Harris. Harris was made co-defendant with Lance; Hall claimed title under a sheriff's deed upon sale under execution issued on a judgment against Howard the mortgagor. The court held that the outstanding title was available for the mortgagee or his tenant, but not for the tenant of the mortgagor, or one claiming under him.

The Circuit court held (8 Bissel, 456), that the order regarding the collection of rents did not terminate the lease. The effect of the order nowhere appears to have changed the relations of the parties. It does not appear from the record that the lessee had any notice of the entry of the order, or that it at any time attorned to the receivers. We submit, therefore, that on the 3d day of May, 1876, when the plaintiffs in error received their deed, the lessee was the tenant of the Columbus, Chicago and Indiana Central Railway Company, and a stranger to everybody else, and that thereupon said lessee became the tenant of the plaintiffs in error, so far as the property in question is concerned, and that such relation also existed at the time this suit was commenced, viz: January 8, 1877.

Furthermore, if the order in question did operate to change the relations of the defendant in error as a tenant under said lease, it did not affect the property in question, because the record shows that the Circuit court found the fact to be that the lease itself did not purport to demise after acquired property, and the order of the court purports to affect only the rents "payable under the terms "of the lease."

That the property in question should be treated as after-acquired property will also appear further on.

We submit, therefore, that neither the mortgage itself nor the order of the court operated to make the defendant's possession rightful as against the plaintiffs in error.

What, then, was the operation of the lease in that respect?

It will be observed that the plaintiffs' judgment was recovered April 19, 1873, and if it had the operation we have claimed, it became at once a lien on all the interest

which third persons were legally entitled to suppose the Columbus, Chicago and Indiana Central Railway Company then had in the premises in question.

The property in question was contracted for in the "spring" of 1868, but it does not appear that the title was acquired by the Columbus, Chicago and Indiana Central Railway Company until 1872. The two deeds bear date February 2d and May 31, 1872, respectively, whereas the lease bears date February 1, 1869. It is true the defendant was then in possession, and if we accord to the defendant in error all the rights which are accorded to individuals incident to the actual possession of real estate, then the plaintiffs in error were bound to inquire as to the right, if any, which the defendant had to the property in question. Its lease was not then recorded; but assuming that its possession compelled an inquiry as to its terms, then of course resort must be had thereto. An examination, which for the purposes of this point it may be conceded, the plaintiffs in error were bound to make, showed that the defendant was, according to the terms of the lease, entitled to the use of all the property which the Columbus, Chicago and Indiana Central Railway Company owned on the day of the date thereof, viz., February 1, 1869.

Inquiry might then properly be made as to what property the Columbus, Chicago and Indiana Central Railway Company had acquired since the date of the lease. Such an inquiry must have resulted in a discovery of the deeds of conveyance above referred to, dated in 1872, so that considering the title of the Columbus, Chicago and Indiana Central Railway Company, and the defendant in error to be in every respect the same as the lease and

deeds purported to make it to the property in question, it was, nevertheless, outside the provisions of the lease.

The lease referred to was recorded July 21, 1873. It must, therefore, have been a written instrument; and as none other is referred to in the record, it follows that any other lease or arrangement between the Columbus, Chicago and Indiana Central Railway Company and the defendant must have rested in parol.

A parol contract relating to an interest in lands for a longer term than one year is void.

Section 1, Chapter 44, entitled Frauds and Perjuries, Rev. Statutes Illinois, 1845, page 258, is as follows:

"SECTION 1. No action shall be brought whereby to "charge any executor or administrator upon any special "promise to answer any debt out of his own estate, or "whereby to charge the defendant upon any special "promise to answer for the debt, default or miscarriage "of another person, or to charge any person upon any "agreement made upon consideration of marriage, or "upon any contract for the sale of lands, tenements or "hereditaments, or any interest in or concerning them, for "a longer term than one year, or upon any agreement "that is not to be performed within the space of one year "from the making thereof, unless the promise or agree- "ment upon which such action shall be brought, or some "memorandum or note thereof, shall be in writing, and "signed by the party to be charged therewith, or some "other person thereunto by him lawfully authorized."

This provision continued in force until 1874, when it was substantially re-enacted. (See Sec. 2, Chapt. 59, Rev. Statutes Illinois, 1874, p. 540.)

It received a judicial construction in *Olt* v. *Lohnas*, 19

Ill., 576, where the court held that a parol or verbal agreement made in October, 1856, whereby a party agreed to lease his farm for one year, to commence on the 1st of March, 1857, and terminate on the same day in 1858, was void. To the same effect are

Comstock v. *Ward*, 22 Ill., 248.
Wheeler v. *Frankenthal*, 78 *id.*, 124.
Perry v. *McHenry*, 13 *id.*, 227.

Part performance of such a contract will not in law operate to take the case out of the provisions of the statute.

Wheeler v. *Frankenthal*, *supra*.

Nor could this lease rest partly in writing and partly in parol.

An action of covenant lies on a specialty exclusively, and not on a specialty modified and enlarged by simple contract. The altering of a written contract by parol makes it all parol.

Vicary v. *Moore*, 2 Watts (Pa.), 451.

If mere alterations be made in a written contract, it is thereby reduced to the grade of a mere unwritten contract.

Dana v. *Hancock*, 30 Vt., 616.
Briggs v. *Vermont, &c., R. R. Co.*, 31 Vt., 211.

A sealed executory contract can not be modified or in part changed by parol agreement, so as to authorize either party to sue upon it as thus modified. Where a lease under seal fixes upon a certain amount of rent to be paid each month, a parol agreement changing the amount of rent to be paid for the unexpired term, and

leaving the lease in other respects unchanged and in force, is not binding upon the lessor, and he will notwithstanding such parol agreement be entitled to recover the amount of rent called for by the lease.

Barnett v. *Barnes*, 73 Ill., 216, citing
Hume Bros. v. *Taylor*, 63 Ill., 43.
Chapman v. *McGreer*, 20 Ill., 101, cited in
Loach v. *Farnum*, 90 Ill., 368.

See also

Baker v. *Whiteside*, Breese, 174.

Contract can not rest partly in writing and partly in parol.

Longfellow v. *Moore et al.*, 102 Ill., 289.

The defendant's possession of the premises in question was in effect the possession of the Columbus, Chicago and Indiana Central Railway Company. The defendant was in law the agent or servant of the owner of the property. The defendant operated the road *for* the owner and *not in the place and stead* of the owner. This proposition is deducible from very many decisions.

P. C. & St. L. Ry. Co. v. *Campbell*, 86 Ills., 443.
P. & R. I. R. R. Co. v. *Lane*, admr., 83 *id.*, 448.
P. R. I. & St. L. R. R. Co. v. *Heflin*, 65 *id.*, 366.
West v. *St. L. V. & T. H. R. R. Co.*, 63 *id.*, 545.
C. & R. I. R. R. Co. v. Whipple, 22 *id.*, 105.
O. & M. R. R. Co. v. *Dunbar*, 20 *id.*, 624.
R. R. Co. v. *Barron*, 5 Wallace, 90.

Penn'a Co. v. *Roy*, 102 U. S., 451.
I. C. R. R. Co. v. *Kanouse*, 39 Ill., 272.
T. P. & W. Ry Co. v. *Rumbold*, 40 Ill., 143.

The foregoing cases hold that the owner and lessor of the railway is responsible for the misconduct of the lessee or person actually in possession operating the property.

We see no reason why the proposition last stated is not fully applicable as to the case of a judgment creditor seeking satisfaction of his judgment as it is to the case of a person seeking a judgment, and we invoke the aid which that principle affords.

It is unnecessary we think to discuss the point secondly assigned as error.

We submit the judgment below should be reversed.

GEORGE WILLARD,
Of Counsel for Pl'ffs in Error.

112-33

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1883.

HARRIET SKIDMORE, ET AL.,
Plaintiffs in Error,
vs.
THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY,
Defendant in Error.

Error to the Circuit Court for the Northern District of Illinois.

ARGUMENT.

BY

GEORGE DRIGGS,
Of Counsel for Plaintiffs in Error.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
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ARGUMENT.

MAY IT PLEASE THE COURT:

The questions presented in this record involve a rule of property, and therefore should be decided agreeably to the statutes, and the decisions of the Supreme court, of the State of Illinois wherein the property is situated.

The most important question presented is, whether under the laws of Illinois the property in controversy, consisting of parcels of land upon which are situated a round house, shops, and side tracks, located at the terminus of a railway, and necessary for the operation of the line, can be sold separately from the franchise, and the rest of the company's property, under execution upon a

judgment against the railway company the same as in the case of an individual debtor.

The statutes of the state relating to judgments and execution sales thereunder, which were in force at the time the proceedings in this case were had, are set out in the brief of Mr. Willard, now on file. Those statutes are general in their provisions, and apply as well to the property of corporations as to individuals, except so far as the court has construed them differently.

The provision relating to execution liens and sales was enacted in 1845, when but few railways were in operation in the state, but the provision was retained and reenacted in the revision of 1874. (See Chap. 77, page 621, Rev. Stat. Ill. 1874.) At that time the amount and value of railway property in the state was known to be very great. The subject was prominently before the people of the state, and it would seem that if the legislature had intended that railway property of any kind should be exempt from the general provisions of the law, such intention would have been expressed therein.

Previous to the revision of 1874 the Supreme Court of Illinois had not intimated in any reported case that the statute would be construed so as to make an exemption in favor of railway companies; but, on the contrary, whenever the subject was before the court, the discussion elicited expressions to the effect that the legislative department of the government had not itself made an exemption, and that the judicial department was powerless to make one for it. (See *Hunt et al.* v. *Bullock et al.*, 23 Ill., 320.)

The Supreme court, however, previous to the date of the present constitution of Illinois (1870), had held in *Titus* v. *Mabee*, 25 Ill., 257, and in *Titus* v. *Gin-*

heimer, 27 *id.*, 462, that the cars and locomotives of a railway company formed a part of its real estate, and that a sheriff or constable could not, by his own act, separate them from the road and thereby make them personal property, subject to levy and sale as such, but the rule thus established unquestionably led to the adoption of the constitutional provision which asserts that cars and locomotives shall be considered personal property, and liable to execution and sale as such. (Const. Ills., Art. XI, Sec. 10.)

The more recent decisions in *Railroad Company* v. *Thompson*, 103 Ill., 187, and *Cooper* v. *Corbin*, 105 *id.*, 224 (unreported), do not impair the force of the previous legislation and the previously decided cases. In the first of the two cases last mentioned it was held that an *entire* line of railway might be sold without right of redemption under the statute, but the reasoning which led to that decision would in a degree tend to show that the company might redeem when, as in the present case, there had been a sale of a *part* of the company's property; and the same may be said concerning the effect of the decision of this court in *Hammock* v. *Trust Company*, 15 Otto, 77. The case of *Cooper* v. *Corbin* is quite foreign to the questions involved in this record.

All the foregoing decisions seem to be based upon considerations of the relations between the railway companies and the state, and the relations between creditors of a common debtor, and in that respect the three cases last cited carry the rule of public policy, which is involved in the relations between the state and the railway companies, and the rule of equity which is involved in the relations between creditors, quite as far as consistency will permit.

As between the State of Illinois and the railway companies incorporated by it, the state clearly cannot desire that the modicum of sovereignty granted to them shall operate to shield them to the injury of the citizen. These corporations, once weak and needing parental care, have grown to such enormous strength as to create a feeling of unrest in the minds of the citizens. That unrestful feeling has frequently been evinced in various ways within the past few years, and, we submit, public policy now forbids that the courts should by construction further limit the plain provisions of the statute involved in this cause.

There is nothing in the relations between the creditors of a railway company that requires the court to hold that a statute, general in its provisions respecting the sale of property under execution, is insufficient to authorize a sale of such property, and the giving of a deed therefor by the sheriff in case of non-redemption, in the absence of any resort to the equity powers of the court by the judgment debtor himself, or by some creditor to restrain such sale or the making of such deed. The presumption is a fair one, that if the judgment debtor, or any of the other creditors shall deem that their rights will be prejudiced by such execution sale, they will call into action the equity powers of the court to restrain such sale and the making such deed, as did the debtor in the cases of *Pennock* v. *Coe*, 23 How., 117, and *Gue* v. *Canal Company*, 24 *id.*, 257.

If the Columbus, Chicago and Indiana Central Railway Company, or its bond creditors, desired to avoid the result of the application of the strict rules of law, they could have resorted to a bill in chancery to enjoin such application.

The company made no objection to the issuance of the execution and sale thereunder of the property in question, nor to the execution and delivery of the deed by the sheriff upon non-redemption from the sale. The company, its lessee and bond creditors, allowed the law to take its course. And unless the deed from the sheriff is absolutely void, it operated to convey to the plaintiffs in error all the right, title and interest which the Columbus, Chicago and Indiana Central Railway Company had in the property at the time of the recovery of the judgment, viz: April 19, 1873.

The equitable rights which the Columbus, Chicago and Indiana Central Railway Company and those interested in its property may have had by bill in chancery to prevent the sheriff from selling the lots in question cannot, nor can any other equitable rights avail in this case as against the strict legal rights of the plaintiffs in error.

Fisher v. *Eslaman*, 68 Ill., 78.

As between the plaintiffs in error and the defendant and others that may be interested in the railway property, there is no good reason for holding the deed to be void.

The stock and bondholders furnish, it may be said, the means necessary to build and equip the road. But the road and equipment is practically worthless without the means necessary to its operation, betterment and extension. Whoever therefore furnishes labor, material or money, for that purpose is, on general principles of equity, as worthy a creditor as a bond creditor.

The company having been given power to contract and be contracted with, suppose a person has loaned it money with which to pay for material or additional lands,

necessary at the terminus of the line, or has furnished the material or the land itself. Payment being requested, the company neglects or refuses to comply. Suit is thereupon brought by the creditor (the company having under its charter power to sue and be sued) and a judgment is recovered.

But the company neglects or refuses to satisfy the judgment, and the same is worthless unless the law provides a way for enforcing satisfaction. The judgment creditor finds the company has thirty millions of dollars worth of property, more or less, but that it is all mortgaged, together with the income therefrom, to secure the payment of fifteen millions of dollars, more or less, and that the income is not sufficient to pay the interest on the mortgage debt. Further examination reveals the fact that the company owns certain other parcels of land which are not covered by the mortgage. How, then, shall the judgment creditor proceed to obtain satisfaction of his judgment out of those lots? Taking an equitable view of the circumstances, he sees that the lots are necessary to the operation of the road, but as between him and the bond creditors and stockholders, the latter paid nothing towards the lots.

Equitably, therefore, he has as much right to have the property applied in satisfaction of his judgment as the others have to its use and operation for the enhancement of the value of their security. What course shall be now pursued? Must he, in the absence of a request by the bond and stockholders, resort to a bill in chancery for the sale of the entire property, without redemption, or may he under the general provisions of the law have a sale of the lots on execution issued on his

judgment, and to a deed and possession in case of non-redemption?

The former is an extraordinary remedy, highly expensive, and uncalled for by the others interested in the property. Besides, in case of sale, the judgment creditor is not likely to be benefited, unless he himself is able to bid several millions of dollars for the property.

In the case of *Railroad Company* v. *James*, 6 Wall., 750, the court held under the statutes of Wisconsin making a judgment a lien on real estate, that a sale under a decree in chancery and conveyance in pursuance thereof, confirmed by the court, would operate to pass the whole of the interest of the company, existing at the time of its rendition, to the purchaser.

But it will be seen that such a course would be very expensive, and in all probability of little avail to the judgment creditor, whereas the course secondly above suggested would be found inexpensive and efficacious. Under such circumstances, will the court hold that he may not pursue the latter course?

The right of such judgment creditor to a sale on execution and to a deed and possession thereunder should be upheld, even as to mortgaged property.

In Illinois, the interest of a judgment debtor in real estate mortgaged by him is subject to levy and sale on execution. (See Sec. 3, Chapt. 77, Rev. Statutes Ill., quoted on page 8 of Mr. Willard's brief.)

In the present case, therefore, if the property in controversy could be held to be covered by the mortgage in question, the mortgagor would, nevertheless, presumably, have the right, if in possession, to deliver such possession to the plaintiffs in error, to be by them held for their

benefit, as judgment creditors, until such time as the mortgagees should acquire a right to the possession, notwithstanding such delivery might embarrass the Columbus Chicago, and Indiana Central Railroad Company in the management and operation of the road.

If the owner and mortgagor, Columbus, Chicago and Indiana Central Railway Company, was not in possession, but had instead a right of possession, such right could be assigned to the plaintiffs in error, and be asserted by them for their benefit as judgment creditors, until such time as the mortgagees should acquire a right to possession. (See Sec. 3, above referred to.)

To hold otherwise is to hold that execution creditors are without remedy, save the extraordinary one hereinbefore referred to, which remedy, as we have illustrated is substantially impracticable as a means of collecting a debt of the amount involved in this cause.

In *Bruffett et al.* v. *Great Western R. R. Co.*, 25 Ill., 353, it was expressly declared that "for the purposes of "acquiring satisfaction of any judgment they (individuals) "may resort to their (railway companies) property as to "that of individuals."

The plaintiffs in error had a right to the possession of the premises in question.

As between the Columbus, Chicago and Indiana Central Railway Company, the mortgagor, and Roosvelt and Fosdick, the mortgagees, the former was the owner of the property covered by the mortgage.

Hall v. *Lance*, 25 Ill., 277.

We do not think it appears that the mortgagees ever

sought in any manner to take possesion of the lots in question.

The only evidence upon that point is the order of the court. The order purports to authorize the collection of the "rents which were payable under the terms of the lease." But that did not affect the lots. The court found that the lease *did not purport to convey after acquired property*, and we respectfully contend that the lots in question are within the term, "after acquired property," and therefore are not within the provisions of the lease.

The deeds of the property are dated in 1872, while the lease is dated 1869. The lots were contracted for in the spring of 1868, but the title was not acquired until four years later. Acquiring the lots and acquiring the title thereto are synonymous terms.

It is only where no rule of law is infringed and the rights of third persons are not prejudiced, that courts of equity will in certain cases give effect to mortgages or leases of after acquired property.

Beall v. *White*, 4 Otto, 382.

The lessees, Pittsburgh, Cincinnati and St. Louis Railway Company had no right to the possession of these lots.

The lease does not purport to cover these lots, the same being after-acquired property. The only other claim to a right of possession by the Pittsburgh, Cincinnati and St. Louis Railway Company is, that the company received possession of these lots at the date of the lease, and that such possession has since continued the same as though covered by the lease.

But possession by a lessee of a railway, and the operation thereof, is mere possession of the owner and lessor.

The rule, as to the rights and liabilities of lessor and lessee of a railway line, is very different from the rights and liabilities between lessor and lessee of property which is not connected with a right of use in the public.

In *Railroad Company* v. *Dunbar*, 20 Ill., 624, the company as a defense to a suit for injury to goods, received for transportation, plead specially that it had leased its road, &c., to one G. W. Jenks. A demurrer to the plea was sustained, and judgment rendered against the company. On appeal the judgment was sustained. The court said: "If such leases may be made and the effect "claimed results from them, railroads may avoid all liabil- "ity to the public. And if such leases should "be to irresponsible, and reckless persons, the remedies "for wrongs inflicted, duties omitted, and contracts vio- "lated by the lessee, would not be worth pursuing."

In *West* v. *Railroad Co.*, 63 Ill., 545, the court, referring to lessees of railways, said: "These persons must be re- "garded, in such cases, as the servants of the company, "acting under its directions, and the company must see that "the special privileges given to it by its charter are not "abused." To same effect are *Railroad Co.* v. *Lane, Admx.* 83 *id.*, 448, and *Penn. Company* v. *Roy*, 102 U. S., 451.

It would be an anomaly if, for the purpose of recovering a judgment against the lessor, the lessee in possession should be deemed its servant and agent, but that for the purpose of obtaining satisfaction of that judg-

ment the lessee in possession should be deemed a principal.

The defendant's right, such as it was, to the possession of the lots in question, on the 19th day of April, 1873, when the judgment was recovered, rested in parol. And a parol lease or contract for an interest in lands in Illinois is void under the statutes of the state.

More than one year had elapsed between the time when the Pittsburgh, Cincinnati and St. Louis Railway Company took possession, and the time of the commencement of this suit.

The taking of possession of the lands under a parol lease or contract for the use of land during a period longer than one year, is not such an execution of the lease or contract as will take it out of the statute of frauds. In such case the lease or contract is deemed to be executed only as to such time as the possession has continued. As to the unexpired portion of the term, it is absolutely void.

In the case of *Swanzy* v. *Moore*, 22 Ill., 63, the plaintiff below (Moore) brought suit for wages earned under a contract void in law under the statute of frauds. The contract in question was made about a week prior to the 5th March, 1856, for a year's services from the date last mentioned to be performed by Moore in the employ of Swanzy, provided they could agree. Moore labored from the 5th March until the 25th August, when he quit, and brought suit for the labor he had actually performed. The evidence was conflicting upon the question, whether Moore quit Swanzy's service without just cause, and the court refused to instruct the jury that Moore could not manufacture a pretense to disagree with Swanzy, but that

he must have had good reason to disagree, to entitle him to quit before the expiration of the time. The refusal the Supreme court held was error, and the judgment below was accordingly reversed. We quote from the opinion as follows:

"CAYON, C. J.: This work was done under a contract "void by the statute of frauds, and the question is whether "Swanzy could insist upon the violation of the terms of "the contract as a defense to the action. Upon this there "can be no reason to doubt when the character of such a "contract is considered. It will be found that executory "contracts are only avoided by the statute of frauds. Ex- "ecuted contracts never. A parol contract which that "statute requires to be in writing is as good as any when "performed, or while being performed, or when partly "performed, so far as the performance goes." * *

"Here was a contract that he should work one year "for so much money. Till that service was performed "he was entitled to no pay. Whatever he did under that "contract must be controlled by its terms. He worked a "portion of the time and quit without cause."

"By the terms of the contract under which he did the "work, he is entitled to no pay. * * * He was not "bound to work, under the contract, a single day longer "than he pleased. Swanzy could not sue him for a viola- "tion of his contract which was obnoxious to the statute "of frauds. While executory, either party might repu- "diate it; when executed, or so far as executed, it was as "valid and binding as if it had been in writing."

Under the rule here laid down, either the Columbus, Chicago and Indiana Central Railway Company, or the Pittsburgh, Cincinnati and St. Louis Railway Company

might legally refuse to longer carry out a parol contract for the lease of the lots in question for ninety-nine years. If such refusal was made by the Columbus, Chicago and Indiana Central Company after a lapse of a portion of the term, the Pittsburgh, Cincinnati and St. Louis Company could not recover back such sums as it may have paid as rent, nor, in case of the absence of any payment, could the Columbus, Chicago and Indiana Central Railway Company recover any stipulated rental for the period of such occupancy, upon a refusal of the Pittsburgh, Cincinnati and St. Louis Railway Company to longer assent to a continuation of the lease.

It is respectfully submitted that the judgment should be reversed.

GEORGE DRIGGS,
Of Counsel for Plaintiffs in Error.